was clearly decided in conformity with the present state of New York law, since the mere fact that a widow derives advantage from the terms of a will is no indication that the testator intends to bar her dower.[11] Cases in which the will prescribed devises of lands to the wife out of which she was entitled to dower,[12] or devises of lands on trusts,[13] have also been held not inconsistent with the dower right. If, however, the purposes of the trust require that the entire title, free from the dower interest of the widow, be vested in trustees in order to effectuate the purposes of the testator in creating it, the widow is bound to elect.[14] An example of such a trust appears in the recent case of *Matter of Springsteen* (Surr. Ct. N. Y. 1914) 86 Misc. 389, in which the testator, after leaving his wife a life estate in the house and furniture, devised and bequeathed the remainder of his property to trustees to divide the income equally between his wife and son, and the court held an election necessary. The distinctions made in such cases seem somewhat tenuous, but they help the courts to derive some settled rule for divining the intention of the testator. In some jurisdictions, statutes have so altered the common law presumption that any testamentary provision for the wife's benefit is *prima facie* in lieu of dower,[15] a rule which affords a construction more often in accord with the testator's intent.

In view of the foregoing considerations, it is obvious that common law dower is both cumbrous and inadequate. It is, therefore, to be hoped that the law of dower in New York will soon be subjected to a thorough revision, so that a substantial testamentary provision in the wife's favor may be construed to be presumptively in lieu of dower, and in the absence of such provision, that the widow may receive an absolute estate in some portion of all the property, both real and personal, of which her husband died possessed.[16]

STATUS OF INDIANS BEFORE STATE AND FEDERAL COURTS.—The status of the American Indians before the State and federal courts has been the subject of much dispute and speculation. The Indians are called aliens,[1] but, unfortunately, a number of complicating circumstances prevent them from having the same rights and liabilities as other

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[11]Matter of Fraser (1883) 92 N. Y. 239, 249. This common law presumption is also the rule in the community States. Theall *v.* Theall (1834) 7 La. 226; Herrick *v.* Miller (1912) 69 Wash. 456; see Morrison *v.* Bowman (1865) 29 Cal. 337.

[12]Lawrence *v.* Lawrence (1699) 2 Vern. 365; Rathbone *v.* Dyckman (N. Y. 1831) 3 Paige Ch. 9, 30; 2 Scribner, Dower (2nd ed.) 444.

[13]Ellis *v.* Lewis (1844) 3 Hare *310; Wood *v.* Wood (N. Y. 1836) 5 Paige Ch. 596; 2 Scribner, Dower (2nd ed.) 451.

[14]Vernon *v.* Vernon (1873) 53 N. Y. 351; see Konvalinka *v.* Schlegel, *supra*, p. 130; *cf.* Savage *v.* Burnham (1858) 17 N. Y. 561.

[15]See Warren *v.* Warren (1893) 148 Ill. 641; Griggs *v.* Veghte (1890) 47 N. J. Eq. 179.

[16]See editorial in New York Law Journal for July 24, 1914.

[1]Elk *v.* Wilkins (1884) 112 U. S. 94. By statute, 24 U. S. Stat. at L. 390, an Indian to whom an allotment in severalty has been made, or who has voluntarily separated from his tribe and adopted the habits of civilized life, Bird *v.* Terry (C. C. 1903) 129 Fed. 472, is now made a citizen of the United States who can resort to the courts as any other citizen.

aliens. Thus, although they are aliens, and are not citizens of the United States or of any State of the Union, yet, on the other hand, they are not citizens of any foreign state.[2] They are called, simply, "wards of the nation". Again, an Indian tribe is not a State of the Union,[3] nor has it enough of the attributes of sovereignty to make it a foreign state capable of suing in the Supreme Court,[4] or of treating with European nations.[5] And yet, it is so far a sovereignty that it could make treaties with the United States until Congress passed an act to the contrary,[6] and it may, under some circumstances, be immune from the laws of the State in which its reservation lies.[7] Its status has been determined by Chief Justice Marshall to be that of a "domestic dependent nation." Still further confusion arises from the peculiar title by which the Indians hold their reservations. Their title is not absolute, and so they cannot be treated as small independent nations set down in our midst. They are held to possess a mere right of occupancy to lands the ultimate title to which is in either some State or the federal government.[8] This ultimate title carries with it the exclusive right of pre-emption, which means that the Indians can transfer their title only to the governments possessing this ultimate title. When we add to all these complications the fact that the rights of different tribes have been settled by widely different treaties and statutes, we see that matters are indeed chaotic.

The subject may be divided under two heads: (1) the status of the Indians when they leave their reservations and mingle with the whites, and (2) their status while on their reservations.

If the mooted doctrine of ubiquity of national status[9] be accepted, the Indians carry their privileges and disabilities with them wherever they go. "They are irresponsible by their own laws; they would continue irresponsible when they leave their reserves."[10] At least one State seems to have held their status to be such that in all difficulties among themselves they are beyond the jurisdiction of our courts. This means that an Indian can kill another on a city street without fear of punishment, in the absence of an express statute conferring jurisdiction over such cases on the State courts.[11] But the correct view is that when they mingle with whites, Indians have the same status as

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[2]An Indian, therefore, cannot have a suit to which he is a party removed to the federal courts on the ground of diversity of citizenship. Paul *v.* Chilsoquie (C. C. 1895) 70 Fed. 401.

[3]Cherokee Nation *v.* Georgia (1831) 5 Pet. 1.

[4]Cherokee Nation *v.* Georgia, *supra.* Nor can a tribe sue even in a State court without the aid of an enabling statute. Johnson *v.* Long Island R. R. (1900) 162 N. Y. 462.

[5]See Worcester *v.* Georgia (1832) 6 Pet. 515.

[6]*Cf.* Worcester *v.* Georgia, *supra;* United States *v.* Kagama (1886) 118 U. S. 375; Rev. Stat., § 2079.

[7]Worcester *v.* Georgia, *supra;* The Kansas Indians (1866) 5 Wall. 737.

[8]Johnson *v.* M'Intosh (1823) 8 Wheat. 543; Seneca Nation *v.* Christie (1891) 126 N. Y. 122.

[9]Wharton, Conflict of Laws (3rd ed.) § 84 *et seq.*

[10]Wharton, Conflict of Laws (3rd ed.) § 9.

[11]See State *v.* McKenney (1883) 18 Nev. 182; State *v.* Buckaroo Jack (1908) 30 Nev. 325.

other aliens. They are responsible to their own tribesmen,[12] as well as to other people,[13] and they have the same right to resort to the courts as other aliens.[14] Furthermore, their responsibility in such cases is governed by our laws, and not by their own laws and customs.[15] The only obstacle that hinders the States from treating such Indians exactly like other aliens, lies in the fact that the guardianship of the federal government over these wards of the nation and the right of Congress to legislate concerning them continue even after they leave their reservations.[16]

When we come to determine the status of Indians living on their own reservations, the question is more difficult. In the recent case of *People* v. *Daly* (N. Y. 1914) 105 N. E. 1048, it was contended that the Congressional Act of March 4, 1909,[17] conferring on the federal courts jurisdiction of certain crimes committed by Indians against other Indians "within the boundaries of any state * * * and within the limits of any Indian reservation", did not apply to certain Indian tribes in New York, the argument being that those Indians were wards of the State, rather than of the federal government, and that, therefore, congressional legislation as to Indians in general did not apply to them. But the court correctly held that, regardless of what may be the power of the States over such Indian reservations, Congress can extend its legislation to all Indian lands, no matter how or where they may be situated;[18] and when Congress does act, the power of the State must yield to the paramount authority of the federal government. The doctrine, however, that Indians may be wards of a State is not without support,[19] and the recent case of *George* v. *Pierce* (N. Y. Sup. Ct. 1914) 148 N. Y. Supp, 230,[20] shows that it may be of great assistance in determining the right of the various States to impose laws on Indian reservations within their borders. In some instances, this right has been vigorously denied by the Supreme Court,[21] but it has often been exercised by the States,[22] and the Supreme Court, itself,

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[12]Hunt *v.* State (1866) 4 Kan. 60; State *v.* Ta-cha-na-tah (1870) 64 N. C. 614.

[13]Murch *v.* Tomer (1842) 21 Me. 535; Rubideaux *v.* Vallie (1873) 12 Kan. 28.

[14]See note to Missouri Pac. R. R. *v.* Cullers (Tex. 1891) 13 L. R. A. 542; Johnson *v.* Pacific Coast S. S. Co. (1904) 2 Alaska 224, 239.

[15]Wharton, Conflict of Laws (3rd ed.) § 9.

[16]See United States *v.* Pelican (1914) 232 U. S. 442. This guardianship continues even after citizenship. *Cf.* Bowling *v.* U. S. (1914) 233 U. S. 528.

[17]35 U. S. Stat. at L. 1151.

[18]United States *v.* Kagama, *supra;* United States *v.* Pelican, *supra;* Apapas *v.* United States (1914) 233 U. S. 587.

[19]Danzell *v.* Webquish (1871) 108 Mass. 133; Johnson *v.* Long Island R. R., *supra;* Hatch *v.* Luckman (1913) 155 App. Div. 765.

[20]This case holds (1) that the New York courts can try disputes between Onondaga Indians as to the possession of lands within their reservation, and (2) that the courts should apply the Indian laws and customs except where the legislature can and does impose laws in their stead.

[21]Worcester *v.* Georgia, *supra;* The Kansas Indians, *supra;* The New York Indians (1866) 5 Wall. 761; *cf.* Ryan *v.* Knorr (N. Y. 1880) 19 Hun 540.

[22]Peters *v.* Tallchief (1907) 121 App. Div. 309; Hatch *v.* Luckman, *supra;* State *v.* Foreman (Tenn. 1835) 8 Yerg. 256.

has recognized that it may exist in certain cases.[23] Aside from treaties and congressional legislation, the principal factor in determining this right is the title by which the Indians hold their reservations, and this matter of title is the foundation of the wards-of-the-State theory, above referred to. Where Indians come into a State and acquire their lands by purchase from private individuals, as the Tonawandas have done in New York,[24] the State should have as much control over them as it would have over a colony of Europeans in similar circumstances, assuming, of course, that Congress has not exercised its right to legislate to the contrary. On the other hand, where Indians occupy lands the ultimate title to which is in the federal government, it is settled that no State which, subsequently, may be created around those lands has any right over them in the absence of express treaties or congressional legislation to that effect.[25] But where, as in some of the older States, the Indians occupy lands the ultimate title to which is in a State, such State should be at liberty to exercise all control over these its lands[26] which is not inconsistent with treaties and congressional legislation concerning those Indians.[27]

OPERATION OF RAILROAD AS A NUISANCE.—In England, the power of Parliament to legalize nuisance is unlimited,[1] but in this country, such legislation is usually unconstitutional, because falling within the prohibition against depriving a person of his property without due process of law, or against taking private property for public use without just compensation.[2] Some courts, however, have declared that it is a matter of degree, and that the legislature may authorize small nuisances without compensation, but not large ones;[3] while others, appreciating the difficulty of drawing the line, conclude that the legislature has power to legalize all nuisances.[4] In determining whether the legislature could authorize nuisance incident to the ordinary operation of a railroad carried on in a prudent and careful manner, the courts made an arbitrary distinction between physical taking, and mere annoyance or inconvenience.[5] No action lay, even at common law, against a

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[23]New York *v.* Dibble (1858) 21 How. 366; see opinion of McLean, J., in Worcester *v.* Georgia, *supra,* pp. 588-590 and 594; United States *v.* Kagama, *supra,* p. 383; The Kansas Indians, *supra,* p. 752. The States have at times even had the tacit consent of the federal government in making treaties with the Indians. See Seneca Nation *v.* Christie, *supra.*

[24]See Hatch *v.* Luckman, *supra.*

[25]The Kansas Indians, *supra;* Donnelly *v.* United States (1913) 228 U. S. 243, 271.

[26]Peters *v.* Tallchief, *supra;* Hatch *v.* Luckman, *supra;* Silverheels *v.* Maybee (N. Y. 1913) 82 Misc. 48.

[27]Fellows *v.* Blacksmith (1856) 19 How. 366; The New York Indians, *supra.*

[1]Burdick, Torts (3rd ed.) 52.

[2]U. S. Const., Amendments 5 & 14.

[3]Sawyer *v.* Davis (1884) 136 Mass. 239. In Penn. R. R. *v.* Marchant (1888) 119 Pa. 541, recovery for damages sustained by the operation of the road, was refused. This was largely based on the peculiar wording of the Pennsylvania constitutional provision.

[4]See Beseman *v.* Penn. R. R. (1888) 50 N. J. L. 235.

[5]Austin *v.* Augusta Terminal Ry. (1899) 108 Ga. 671.